

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ELEANOR G. GABRIEL,

Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

CASE NO. C04-2105RSL

REPORT AND
RECOMMENDATION

Plaintiff appeals to the District Court from a final decision of the Commissioner of the Social Security Administration (“the Commissioner”) denying her application for Supplemental Security Income disability benefits under Title XVI of the Social Security Act. For the reasons set forth below, it is recommended that the Commissioner’s decision be REVERSED and REMANDED for the payment of benefits.

I. PROCEDURAL HISTORY

Plaintiff Eleanor Gabriel filed an application for supplemental security income disability (SSI) benefits on March 14, 2000. Tr. 97-100. She alleges disability from August, 1985 due to

1 depression, emotional and mental health problems. Tr. 97, 102. Her application was denied at the
2 initial level [Tr. 74-77] and upon reconsideration. Tr. 79-81. Plaintiff requested a hearing before an
3 administrative law judge (ALJ), which was granted. Tr. 82, 84. On September 12, 2001, Ms.
4 Gabriel, medical expert Prasanna Pati M.D., and vocational expert William Weiss testified at a
5 hearing before ALJ Arthur Joyner. Tr. 29-71. Plaintiff was represented by attorney Steven Robey.
6 On January 14, 2002, the ALJ issued an unfavorable decision. Tr. 18-22. Plaintiff sought Appeals
7 Council review on January 25, 2002. Tr. 10, 185-86. The Appeals Council denied Plaintiff's
8 request for review [Tr. 5-8], making the ALJ's decision the Commissioner's final decision. 20
9 C.F.R. §§ 416.1481, 422.210. Plaintiff sought judicial review in this Court, represented by David
10 Namba. On April 11, 2003, a Stipulation and Order for Remand was entered in the United States
11 District Court. Tr. 218-20. On June 6, 2003, the Appeals Council vacated the hearing decision and
12 remanded the case for further proceedings. While her case was being reviewed in the district court,
13 Plaintiff filed a second application for SSI and was found disabled and eligible for benefits beginning
14 June 27, 2002.¹ Tr. 223. On May 18, 2004, a hearing on the first application was held in Bellingham
15 before ALJ Ruperta Alexis. Plaintiff was represented by Steven Robey. Plaintiff and vocational
16 expert Robert Aslan testified. Tr. 274-312. The ALJ issued Plaintiff an unfavorable decision on
17 August 30, 2004. Plaintiff filed a timely complaint in U. S. District Court seeking judicial review of
18 the Commissioner's final decision.

19 II. THE PARTIES' POSITIONS

20 Plaintiff alleges that the ALJ's finding that Plaintiff's diagnosed mental retardation and
21 affective disorder do not meet or equal any listing is contrary to law, and not supported by
22 substantial evidence. The Plaintiff also contends that the ALJ reached her decision by erroneously
23 rejecting the psychological evidence and opinions from Plaintiff's treating counselors, and from Dr.

24 ¹ Plaintiff is seeking a closed period of disability from March 14, 2000 through June 26,
25 2002.

1 Kathleen Mayer. The Commissioner maintains that the ALJ's decision is supported by substantial
2 evidence and is free of legal error.

3 III. STANDARD OF REVIEW

4 This Court may set aside the Commissioner's denial of social security disability benefits when
5 the ALJ's findings are based on legal error or are not supported by substantial evidence. *Magallanes*
6 *v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). Substantial evidence means more than a scintilla, but
7 less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate
8 to support a conclusion. *Id.* To determine whether substantial evidence supports the ALJ's
9 decision, we must consider the evidence as a whole, weighing both evidence that supports, and
10 evidence that detracts from the ALJ's conclusion. *Id.* The ALJ is responsible for determining
11 credibility, resolving conflicts in the testimony, and resolving ambiguities. *Id.* Where evidence is
12 susceptible of more than one rational interpretation, it is the ALJ's decision that must be upheld). *Id.*

13 IV. THE SEQUENTIAL EVALUATION PROCESS

14 The claimant bears the burden of proving that she is disabled. *Meanel v. Apfel*, 172 F.3d
15 1111, 1113 (9th Cir. 1999). Disability is defined as the inability to engage in any substantial gainful
16 activity by reason of any medically determinable physical or mental impairment which can be
17 expected to result in death or which has lasted, or can be expected to last, for a continuous period of
18 not less than 12 months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A).

19 The Social Security regulations set forth a five-step sequential evaluation process for
20 determining whether a claimant is disabled under the Social Security Act. *Bowen v. Yuckert*, 482
21 U.S. 137, 140 (1987); 20 C.F.R § 416.920. At step one, the claimant must establish that he is not
22 engaging in any substantial gainful activity. *Id.* At step two, the claimant must demonstrate that he
23 has one or more severe impairments. *Id.* At step three, the Commissioner will determine whether
24 the claimant's impairment meets or equals any of the listed impairments described in the regulations.
25 *Id.* At step four, if the claimant's impairment(s) neither meets nor equals one of the listed

1 impairments, the Commissioner will then evaluate the Claimant's residual functional capacity and
2 past relevant work. If claimant is not able to perform his past relevant work, the burden shifts to the
3 Commissioner at step five to identify jobs existing in significant numbers in the national economy that
4 the claimant can perform given her residual functional capacity, age, education, and work experience.
5 *Tackett v. Apfel*, 180 F.3d 1094, 10100 (9th Cir. 1999). If a claimant is determined to be disabled at
6 any stage of the process, there is no need to consider subsequent steps. *Id.* at 1099.

7 V. SUMMARY OF THE RECORD AND THE ALJ's DECISION

8 Ms. Gabriel was 53 years old at the time of her second hearing. Tr. 278. She did not
9 complete high school Tr. 278. Her last work was as a receptionist in 1985 and cashier in the late
10 80's. Tr. 103, 214, 280, 299, 303.

11 A. Plaintiff's testimony.

12 At the hearing, the Plaintiff testified regarding the impact of her impairments on her
13 activities of daily living. Plaintiff testified that she took amytriptyline for her depression [Tr. 281]
14 and that she had trouble remembering things [Tr. 282] and getting to sleep. Tr. 285. Plaintiff
15 testified that she visited her cousin daily [Tr. 286], did chores and walked her dog. Tr. 287. Plaintiff
16 testified that she drives to the grocery store and doctor's appointments and visits friends. Tr. 300.
17 Plaintiff further testified that she became angry and frustrated on the job [Tr. 287-89] and that she
18 brought that anger home with her and took it out on her kids. Tr. 289, 296. Upon questioning by
19 the ALJ, Plaintiff testified that she couldn't handle work as a receptionist because she couldn't
20 handle all the calls that came in. Tr. 289. Plaintiff testified that it was hard for her to meet
21 strangers, and she became nervous around them. Tr. 288-89. When asked why she couldn't work,
22 Plaintiff responded "that would be two jobs that I would have to do and I can barely make the one
23 job" [Tr, 290-91].² Plaintiff also testified that it was hard for her to remember her job duties. Tr.

24
25 ²Plaintiff referred to taking care of her children as a job. [Tr. 291].

1 291.

2 B. The Hypothetical and the VE's Testimony

3 After determining the Plaintiff's residual functional capacity, the ALJ asked the VE to
 4 identify the Plaintiff's past relevant work. Tr. 303. The VE responded, "receptionist,... cashier."
 5 Tr. 305. The VE found that during the relevant period the Claimant was "49 to 51." *Id.* In phrasing
 the hypothetical, the ALJ stated,

6 [A]ssuming the Claimant was capable of performing work at light range of activity. The
 7 Claimant has some non-exertional limitations and restrictions as follows: "The Claimant
 8 would not have any difficulty in being able to understand and remember short, simple
 9 instructions. The Claimant would not have any difficulty in carrying out short, simple
 10 instructions. The Claimant would have some difficulty in being able to understand and
 11 remember detailed and complex instructions. So, three or more steps she would have
 12 difficulty with. She would have also difficulty in carrying out those instructions. So, if we
 13 limit the Claimant to one to three-step instructions that's probably safe. ... The Claimant
 14 would work best in a job that was very routine where she did not have to exercise a lot of
 15 independent judgment in how she carried out the work performance. She could be trained to
 do the job and then could do it without a lot of independent judgment. She would work best
 in an environment in which she could – which she had limited interaction – superficial
 interaction okay but limited interaction with members of the public, with supervisors, with
 coworkers. And she would also perform best in jobs where she had just a stable work
 situation without a lot of changes from the daily routine and a daily work setting. So,
 assuming these limitations or restrictions, what impact first on past relevant work? Tr.305-
 306.

16 The VE testified that Plaintiff could not perform her past relevant work as a receptionist. *Id.*
 17 The VE testified that Plaintiff could perform the assembly jobs of cannery worker, line worker [Tr.
 18 306-07], and bottle line attendant. Tr. 307. The VE classified the jobs as light duty and repetitive in
 19 nature. *Id.*

20 The ALJ's next hypothetical assumed Plaintiff's testimony to be credible, and incorporated
 21 Plaintiff's alleged hearing loss, reading and math limitations and difficulty with independent judgment.
 22 Tr. 308. The VE testified that the jobs of cashier and receptionist require "the ability to make
 23 judgments in terms of dealing with the public, types of cash/credit transactions...and changing
 24 situations." Tr. 308-09. The VE expressed that noise level would be a concern. *Id.*

25 Plaintiff's counsel asked the VE, assuming a claimant in the first hypothetical would have

1 moderate difficulty responding appropriately to pressures in a work setting, “specifically assuming
2 troubles maintaining a pace or attention to a task,” would that affect the claimant’s ability to perform
3 the jobs identified by the VE. Tr. 309-10. The VE responded “possibly.” Tr. 310. The VE further
4 conceded that assuming the truth of Ms. Gabriel’s testimony about not dealing with stress or her own
5 frustrations at work, “that may very well be possible that it would impact her employability” Tr. 311.

6 C. The ALJ’s Findings

7 Based on an evaluation of the evidence, the ALJ found at step one that Ms. Gabriel had not
8 engaged in substantial gainful activity since her alleged disability onset date of March 14, 2000. Tr.
9 216, F. 1. At step two, the ALJ found that Ms. Gabriel has severe impairments of depression/dys-
10 thymia, mild mental retardation, and degenerative disc disease Tr. 211. At step three, the ALJ found
11 that Plaintiff’s impairments did not meet or equal the requirements of a listed impairment. Tr. 212,
12 216 at F.3. The ALJ then, at step four, determined that Plaintiff could not perform her past relevant
13 work but had the residual functional capacity (RFC) to perform light work. Tr. 216, 217. At step
14 five the ALJ found that Plaintiff was not disabled, as she could perform other work existing in
15 significant numbers in the economy. Tr. 217.

16 VI. DISCUSSION

17 A. The ALJ Improperly Rejected Plaintiff’s IQ Scores

18 Plaintiff argues that the ALJ failed to give a specific, legitimate reason for rejecting Dr.
19 Mayers’ IQ testing and assessment. [Plaintiff’s Opening Brief p. 17]. The Commissioner argues that
20 the ALJ pointed to evidence that contradicted Mayers’ IQ scores.

21 Listing 12.05 for mental retardation specifies that “the required level of severity for this
22 disorder is met when the requirements in [paragraphs] A, B, C, or D are satisfied. Paragraph C of the
23 listing is satisfied if the claimant’s verbal, performance, or full scale IQ is between 60 and 70, and the
24 claimant has a physical or other mental impairment which imposes an additional and significant work
25 related limitation of function. *Id.* Pursuant to the Appeals Council remand order, Kathleen Mayers,

1 Ph.D., performed a full clinical psychological health examination and administered several psychiatric
2 tests. Tr. 241-50. The Intelligence Quotient (“IQ”) test results showed that Plaintiff had mild mental
3 retardation with a verbal score of 67, and a full scale of 69. Tr. 245. Both fall within the range
4 specified in paragraph C. Plaintiff also has dysthymia and degenerative disc disease, both of which
5 the ALJ found to be severe. Tr. 211. Dr. Mayers’ testing shows that Plaintiff has below average
6 functioning in memory, concentration, abstract thinking, judgment, insight, and functions at an
7 extremely slow pace. Tr. 243-44, 245-48. Dr. Mayers also indicated that “she is not very adaptable
8 or very skilled....she tends to be very confused and communicates very poorly.” Tr. 248, 250.

9 The ALJ determined that the Plaintiff’s mental retardation did not meet 12.05C of the
10 Listings. Tr. 212. The ALJ rejected Dr. Mayers WAIS-III finding by reasoning that the “scores are
11 suspect” and that the IQ scores did not accurately represent Plaintiff’s actual ability Tr. 212 solely
12 because Dr. Mayers concluded that Plaintiff “can perform multi-step directions and comprehend and
13 follow simple and complex tasks.” Tr. 212, 244, 248. From the following discussion, it appears to
14 the Court that the ALJ ignored several aspects of Dr. Mayers’ report regarding Plaintiff’s functional
15 ability, as well as ignoring or rejecting the reports of Heidi Henken and Breck Ketchum which
16 corroborate Dr. Mayers assessment of Plaintiff’s functioning.

17 1. Other source evidence

18 The Commissioner argues that Heidi Henken and Breck Ketchum were not acceptable medical
19 sources, and were incompetent to provide diagnoses or other medical opinions. See 20 C.F.R. §
20 416.913(a). The Commissioner also argues that Ms. Henken and Mr. Ketchum’s conclusions that
21 Plaintiff was not employable due to her impairments “are not observations that assist the ALJ in
22 determining Plaintiff’s level of functioning. Rather, these are their opinions on a legal definition of
23 disability, one that is reserved to the Commissioner, and such opinions “are not given any special
24 significance.” (Defendant’s Brief at 14).

25 Once an impairment is established with evidence from an acceptable medical source, the SSA
26 REPORT AND RECOMMENDATION - 7

1 may consider evidence from “other sources” to “show the severity of your impairment(s) and how it
2 affects your ability to work.” 20 C.F.R. 404.1513(d)(1); 416.913(d)(1). Other sources include (1)
3 medical sources not listed in paragraph (a) ... (for example, nurse-practitioners, physicians’
4 assistants...and therapists. Therapist Heidi Henken and Breck Ketchum qualify as “other sources”
5 under the regulations

6 2. Heidi Henken and Breck Ketchum

7 Heidi Henken counseled Plaintiff for depression at the Nooksak Tribal Center and assessed
8 the effect of Plaintiff’s depression on her functioning ability. Heidi Henken’s May 24, 2000 mental
9 status report indicated Plaintiff’s “affect was within normal limits, her recent and immediate memories
10 were normal, and her remote memory was not always believable.” Tr. 150, 214. The ALJ relied
11 upon this as evidence that Plaintiff had no significant impact in functioning. Tr. 214. It is not just this
12 portion, but Henken’s entire report that is relevant here. Henken’s report reflects consideration of
13 numerous other factors.³ For example, Henken stated that Plaintiff’s “speech patterns frequently
14 show aspects of alogia, being abstract and associational, content poor, and difficult to follow.” Tr.
15 144. This is consistent with Dr. Mayers’ assessment that Plaintiff scored a verbal IQ of 67, at the low
16 end of the borderline retarded range. Ms. Henken noted that Plaintiff’s impairments caused Plaintiff
17 to make “frequent mistakes in her attempts at various tasks.” Tr. 144.

18 This opinion corroborates Dr. Mayers assessment that Plaintiff “tended to get confused and
19 stated that she “got lost” when performing some tasks. Tr. 242. Ms. Henken found Plaintiff to be
20 easily distracted, with a “low ability to successfully handle stressful situations, resulting in difficulty
21 staying on task.” Tr. 151. Ms. Henken concluded that Plaintiff’s chances of “functioning consistently
22 or in any kind of long-term way in an employment environment are extremely poor.” Tr. 154. It was

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24 ³ Ms. Henken also assessed Plaintiff’s ability to manage funds; concentration and task
25 persistence; stress tolerance/deterioration and decompensation; social functioning; stream of mental
26 activity, content of thought, mood, orientation, intelligence, judgment and insight. Tr.150-153.

1 Ms. Henken's clinical opinion that Plaintiff could not "successfully manage ongoing regular
2 employment" because "it takes everything Eleanor has to maintain functioning at her current level."
3 Tr. 148. Ms. Henken's observations regarding the effect of Plaintiff's depression on her ability to
4 function are entitled to weight. The ALJ failed to give specific and legitimate reasons for rejecting
5 Ms. Henken's opinion regarding the severity of Plaintiff's impairments.

6 Also in the record are the notes of Breck Ketchum, a certified mental health counselor. Tr.
7 172.⁴ In March 2001, Mr. Ketchum evaluated Plaintiff for the effects of depression on her
8 employability. Tr. 172. Mr. Ketchum noted that Plaintiff continued to be depressed, and experienced
9 "stress when interacting with people." Tr. 172. It was Breck Ketchum's opinion that: "I do not feel at
10 this time that Ms. Gabriel will be able to maintain gainful employment for a number of reasons. The
11 symptoms of depression appear to be long standing and appear to impact Ms. Gabriel severely. She
12 has memory impairments and often speaks in a vague manner that is difficult to track..." Tr. 173. His
13 assessment of Plaintiff's memory functioning and speech impairments agree with Dr. Mayers'.

14 An ALJ must consider all of the significant probative evidence of record. Vincent ex rel.
15 Vincent v. Hecker, 739 F.2d 1393, 1395 (9th Cir. 1984). Here, the ALJ gave no reasons for ignoring
16 Mr. Ketchum's opinion. Although the ALJ need not accept the ultimate conclusion of Plaintiff's
17 employability offered by Henken and Ketchum, their observations regarding her functioning are
18 probative. The ALJ failed to set forth specific and legitimate reasons for rejecting Ketchum's
19 observations regarding the severity of Plaintiff's functional limitations.

20 B. Evaluation of Plaintiff's ADHD at Step Two

21 Plaintiff contends that the ALJ failed to properly establish all of Plaintiff's severe mental
22 impairments. Heidi Henken counseled Plaintiff for depression at the Nooksak Indian Tribal Center
23 from June, 1999 to May 2000. Tr. 144. The ALJ rejected Ms. Henken's diagnosis of ADHD
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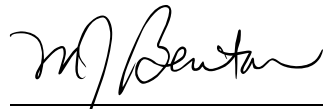
25 ⁴ The identical report appears at Tr. 176-179 dated November 19, 2000.

1 because Dr. Parlatore stated that neurometric testing would be required to substantiate the diagnosis.
2 Tr. 182, 211. The Commissioner states no authority for the proposition that neurometric testing is
3 required to establish ADHD. Accordingly, it appears that the ALJ failed to give specific and
4 legitimate reasons for rejecting Ms. Henken's ADHD diagnosis. Because we reject and remand for
5 an award of benefits, the Court need not remand for further proceedings on this basis.

6 VII. CONCLUSION

7 The ALJ did not consider all of the limitations identified by Plaintiff's treatment providers and
8 examining physicians. Thus, the ALJ's conclusion that the scores are suspect is not in accordance
9 with the objective medical findings. The IQ tests show that Plaintiff satisfied the requirements of
10 Listing 12.05C. Tr. 241-249. This alone demonstrates that the ALJ's interpretation of the medical
11 evidence was not reasonable. The ALJ did not provide *specific and legitimate reasons* for rejecting
12 Dr. Mayers' IQ testing results, and thus her decision is contrary to law. Accordingly, the
13 Commissioner's final decision is not based on substantial evidence and free of legal error. I
14 recommend that the district court REMAND for payment of benefits for a closed period of disability.

15 DATED this 18th day of November, 2005.

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17 MONICA J. BENTON
18 United States Magistrate Judge
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